82474-6

No. 36089-6

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GEORGE KELLEY, as guardian for BB, PB, and NB, minor children,

Appellant,

vs.

CENTENNIAL CONTRACTORS ENTERPRISES, INC.,

Respondents.

SUPPLEMENTAL BRIEF OF APPELLANTS

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP
Darrrell L. Cochran, WSBA No. 22851
James W. Beck, WSBA No. 34208
Attorneys for Appellants

Suite 2100
1201 Pacific Avenue
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500
WSBA No. 22851
WSBA No. 34208

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I. INTRODUCTION

By Order dated May 14, 2008, this Court requested supplemental briefs discussing the impact of various legislative directives on the holding in *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984), and the changes in the relevant statutes since the issuance of *Ueland.* Order (May 14, 2008) at 1. As discussed during oral argument, the capacity of minor children is governed by statute, as is the relevant statute of limitations analysis. RCW 4.08.050 (2008); RCW 4.16.190 (2008). Moreover, Washington law provides for the appointment of a guardian when the claims of a minor child are at issue. RCW 11.88.010 (2008). Under these statutes a minor child lacks capacity to file suit until a guardian is appointed and the statute of limitation for causes of action is tolled until the child reaches the age of majority. These statutes are unambiguous.

Aside from the fact that it was infeasible for the Blackshear children to join in their father's lawsuit because the loss of consortium arose at the time of trial, CP 62-63, as minors who lack capacity to bring suit, the statute of limitations on Appellants' claims is tolled until they reach the age of majority. RCW 4.16.190 (2008). This statute, as amended in 2006, makes this clear. Laws of 2006, ch. 8 § 303. As asserted by Appellants at oral argument, under the particular facts of this case, it was not feasible to join the claims of the minor children with that

of their father. CP 62-63. This should end the inquiry and requires reversal. If, however, the Court should disagree, then the statutes cited above also dictate that this Court reverse the trial court's dismissal of this action.

II. ARGUMENT

There are a number of Washington statutes enacted to protect the interest of minor children. The obvious policy reason for each of these statutes is that minor children lack the ability, knowledge and wherewithal to protect their own legal rights. In fact, Washington courts do not need to guess at the public policy behind these laws because the legislature expressly stated their purpose:

> The legislature recognizes that people with incapacities have unique abilities and needs, and that some people with incapacities cannot exercise their rights or provide for their basic needs without the help of a guardian.

RCW 11.88.005 (2008). Although many of the statutes related to minor children have changed over time, this same basic principle of competency runs through each statute. *Compare* RCW 5.60.050(2) (2008) (providing "[t]he following persons shall not be competent to testify: . . . (2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.") *with* Laws of 1854, p. 186, § 293 (providing "[t]he following persons shall not be competent to testify: . . . 2d. Children under ten years of age, who appear incapable of

receiving just impressions of the facts, respecting which they are examined, or of relating them truly.").

In this case, the claims of the Blackshear children are not subject to dismissal because: (1) their claims are tolled pursuant to RCW 4.16.190 and (2) they lacked the ability to file suit until a guardian was appointed to represent their interest. Each of these issues is discussed in turn below.

A. RCW 4.16.190 Tolls The Statute of Limitations Until Appellants Reach The Age Of Majority.

Washington law, RCW 4.16.190, provides for the tolling of the statute of limitations for the claims of minor children and states as follows:

> Statute tolled by personal disability (1) Unless otherwise provided in this section, if a person entitled to bring an action mentioned in this chapter, except for a penalty or forfeiture, or against a sheriff or other officer, for an escape, be at the time the cause of action accrued either under the age of eighteen years, or incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings, such incompetency or disability as determined according to chapter 11.88 RCW, or imprisoned on a criminal charge prior to sentencing, the time of such disability shall not be a part of the time limited for the commencement of action. (2) Subsection (1) of this section with respect to a person under the age of eighteen years does not apply to the time limited for the commencement of an action under RCW 4.16.350.

RCW 4.16.190 (2008) (emphasis added).

The applicability of this statute to the claims belonging to minor children is not in debate. *E.g.*, *St. Michelle v. Robinson*, 52 Wn. App. 309, 311, 759 P.2d 467 (1988) (citing RCW 4.16.190 and holding that "the

statute of limitations on a civil action for damages is tolled until the victim reaches the age of majority, 18 years.").

By the statute's explicit language, it applies to all claims, "unless otherwise provided in this section[.]" RCW 4.16.190. This introductory clause was added, long after *Ueland,* in 2006 as part of the Medical Malpractice, Patient Safety, and Health Care Liability Reform Act of 2006. Laws of 2006, ch. 8 § 303. The history behind this legislative change is directly relevant to the question before this Court.

In 1979, the Supreme Court was called upon to interpret RCW 4.16.350, which at that time also allowed for the tolling of the statute of limitations when there was a legal disability, just like RCW 4.16.190. *Ohler v. Tacoma General Hospital*, 92 Wn.2d 507, 510-11, 598 P.2d 1358 (1979). There, the *Ohler* Court determined that a parent or guardian's knowledge regarding an act of medical malpractice was not imputed to a minor child. *Id.* Disagreeing with this decision, the legislature later eliminated the statutory language from RCW 4.16.350. Laws of 1987, ch. 212 §1401. However, notwithstanding this change, the Supreme Court later held that a minor's medical malpractice claim was still tolled by RCW 4.16.190 as the statutory change to RCW 4.16.350 failed to impact RCW 4.16.190. *Merrigan v. Epstein*, 112 Wn.2d 709, 716, 773 P.2d 78 (1989); *Gilbert v. Sacred Heart Medical Center*, 127

Wn.2d 370, 375, 900 P.2d 552 (1995). These decisions were abrogated by the 2006 legislative action.

Here, there is no provision within RCW Chapter 4.16 that limits the tolling provided by RCW 4.16.190 in this context. The statute therefore applies. "The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). In this regard, "[w]here statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself." *Young v. Estate of Snell*, 134 Wn.2d 267, 279, 948 P.2d 1291 (1997)(quoting *State ex rel. Royal v. Board of Yakima County Comm'rs*, 123 Wn.2d 451, 458, 869 P.2d 56 (1994)). Because Appellants are minor children, and there is no provision of RCW Chapter 4.16 that provides otherwise, their claims are tolled by RCW 4.16.190.

B. As Minor Children, Appellants Lacked Capacity To File Suit Until A Guardian Was Appointed.

Under Washington law, the Blackshear children could not file suit until a guardian was appointed to represent their interests. Pursuant to RCW 11.88.010 (2008), "[t]he superior court of each county [has the] power to appoint guardians for the persons and/or estates of incapacitated

persons, and guardians for the estates of nonresidents of the state who have property in the county needing care and attention." RCW 11.88.010(1). This statute expressly defines "incapacitated persons" as those who are "under the age of majority as defined in RCW 26.28.010." *Id.* at (1)(d). To complete this analysis, RCW 26.28.010 explains that "[e]xcept as otherwise specifically provided by law, all persons shall be deemed and taken to be of full age for all purposes at the age of eighteen years." RCW 26.28.010 (2008).

Other Washington statutes, RCW 4.08.050 and RCW 4.08.060, also explain that minor children are not competent to proceed with a legal action without the appointment of a guardian. Specifically, RCW 4.08.050 states, in relevant part, that "when an infant is a party he or she shall appear by guardian, or if he or she has no guardian, or in the opinion of the court the guardian is an improper person, the court shall appoint one to act." RCW 4.08.050 (2008) (emphasis added). This statute goes on to explain that "[w]hen the infant is plaintiff" the appointment of a guardian is done "upon the application of the infant, if he or she be of the age of fourteen years, or if under that age, upon the application of a relative or friend of the infant." *Id. See also,* RCW 26.28.015(b) (2008).

RCW 4.08.060 is also applicable if a minor is deemed incapacitated by reason of his or her age. This statute provides that "[w]hen an incapacitated person is a party to an action in the superior

courts he or she shall appear by guardian, or if he or she has no guardian, or in the opinion of the court the guardian is an improper person, the court shall appoint one to act as guardian ad litem." RCW 4.08.050 (2008) (emphasis added).

In the case of the Blackshear children, Centennial Contractors Enterprises, Inc. does not cite any portion of the record to show that a guardian was appointed before their father's trial. The reason is that, in fact, a guardian was not appointed until after their father's trial. CP 7.[1] In particular, George Kelly was not appointed as guardian until May 8, 2006.[2] As this Court discussed during oral argument, Centennial Contractors Enterprises, Inc. had the ability to request that the Court appoint a guardian to represent the interests of these children prior to their father's trial. This did not occur.[3] Because the Blackshear children lacked capacity to bring suit and there was no guardian appointed to represent

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[1] Respondents filed a declaration before the Superior Court erroneously stating that the father's trial began on September 12, 2007. CP 7. This was an obvious error as the declaration two paragraphs later explains that the children's lawsuit was filed approximately six months after the trial. *Id.* at ¶ 10. *See Blackshear v. Centennial Contractors Enterprises Inc.*, No. 04-2-06477-1, available at: http://www.co.pierce.wa.us/cfapps/linx/calendar/GetCivilCase.cfm?cause_num=04-2-06477-1

[2] *In re: George Kelly*, No. 06-4-00759-2 (Pierce County Superior Court), available at: http://www.co.pierce.wa.us/cfapps/linx/calendar/GetCivilCase.cfm?cause_num=06-4-00759-2

[3] Appellants anticipate that Respondents may argue that Appellants' parents are to blame for the children's failure to file suit at an earlier time. This argument, if made, simply highlights the reason why Washington law requires appointment of a guardian ad litem. As noted above, this did not occur until after their father's trial had concluded.

their interest until after their father's trial, this Court should reverse the decision below.

III. CONCLUSION

For the reasons set forth above, in Appellants opening brief, and during argument on this matter, Appellants' respectfully request that this Court reverse the trial court's decision to dismiss the claims of these minor children and remand so that this matter can proceed to trial.

Dated this 13th day of June, 2008.

Respectfully submitted,

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP

By _____
Darrell L. Cochran, WSBA No. 22851
dcochran@gth-law.com
James W. Beck, WSBA No. 34208
jbeck@gth-law.com

Attorneys for Appellants
1201 Pacific Avenue, Suite 2100
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500

CERTIFICATE OF SERVICE

I, Becky Niesen, certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

A. I am a United States Citizen, over the age of 18 years, not a party to this cause, and competent to testify to the matters set forth herein.

B. I am employed by the law firm of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim LLP, 1201 Pacific Avenue, Suite 2100, Tacoma, Washington 98401, attorneys for Appellants.

C. On this 13th day of June, 2008, I served a copy of the attached brief upon the following:

Clerk of the Court
COURT OF APPEALS – DIV. II
950 Broadway, #300
Tacoma, WA 98402
[X] U.S. Mail
[ ] Facsimile
[ ] Overnight Mail
[ ] Messenger Service

William W. Spencer
Daira S. Faltens
Murray, Dunham & Murray
200 West Thomas Street, Suite 350
Seattle, WA 98109
[X] U.S. Mail
[ ] Facsimile
[ ] Overnight Mail
[ ] Messenger Service

Dated this 13th day of June, 2008.

Becky J. Niesen
Becky Niesen